IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12372 of 2006
With
CIVIL APPLICATION No. 8612 of 2006
In
SPECIAL CIVIL APPLICATION No. 12372 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KISHOREBHAI SUKHABHAI PATEL & 1 - Petitioner(s)
Versus
BALLUBHAI RATANJI AHIR - Respondent(s)

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Appearance :
MR ZUBIN F BHARDA for Petitioner(s) : 1 - 2.
UNSERVED-REFUSED (N) for Respondent(s) : 1,

MR CHIRAG PATEL WITH MR BS PATEL for Respondent(s) : 1,
MRS RANJAN B PATEL for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 19/09/2006

ORAL JUDGMENT

1. This petition under Article 227 of the Constitution of India, challenges judgment and order dated 13.06.2006 made by the Third Fast Track Court, Navsari in Misc. Civil Appeal No. 9 of 2005 whereby order dated 23.03.2005 made by the Court of Civil Judge (J.D) below application exhibit 5 in Regular Civil Suit No.68 of 2004 came to be set aside.

2. The petitioners herein are the original defendants in the suit while the respondent is the original plaintiff. Hereinafter the parties shall be referred to as per their respective description in the suit.

3. The plaintiff filed Regular Civil Suit No. 68 of 2004 on 25.08.2004, seeking declaration and injunction qua the suit property, more particularly described in paragraph No.2 of the suit, accompanied by application exhibit 5 seeking temporary injunction. In brief the dispute between the parties pertains to right of way for going to agricultural land bearing block No.410 which according to the plaintiff had been purchased on 04.03.2003 by a registered sale-deed from one Manchhaben

Bhanabhai Jivanbhai. The case of the defendants is that there was no right of way at any point of time and the plaintiff has approached the Court with an incorrect statement. That the Trial Court while passing the order below application exhibit 5 on 23.03.2005, had rightly directed the parties to maintain status-quo in relation to the disputed right of way, but the Appellate Court has committed an error in modifying the said order by directing the defendants not to make obstruction in the suit property while the plaintiff is using the said road.

4. Heard Mr.Zubin Bharda for the defendants and Mr. Chirag B.Patel with Mr.B.S.Patel for the plaintiff. Rule. The learned Advocate for the respondent waives service.

5 As can be seen from the plaint, more particularly the prayers therein, and the prayers in application exhibit 5, if the order as prayed for is made, it would tantamount to allowing the suit even before the trial is conducted. In the circumstances, the Trial Court was justified in restricting the relief to the extent of directing the parties to maintain status-quo qua the disputed right of way till disposal of the suit. The Trial Court has rightly observed that it was not possible to decide the lis between the parties without evidence in this regard being led merely on the basis of the documents on record.

6 However, the Appellate Court has committed an error in law in making the order that it did which virtually amounts to decreeing the suit even before the suit is heard. The approach of the Appellate Court amounts to non application of mind, especially when one considers reference made by the Appellate Court to the observations in the report of the Commissioner appointed by the Trial Court. As can be seen from the said report which is available at Annexure-D (exhibit 12), the Court Commissioner was required to ascertain the position at site in relation to the disputed property viz. the right of way stated to exist between the residential house of the defendants and the residential house of Navinbhai Ghelabhai. After recording that the said panchnama is over, has been read over to the panch witnesses and they have accepted the correct recording, the report goes on to record that thereafter the Commissioner has gone to the disputed suit property bearing block No.410 and proceeds to describe the said property. In that part of the report it is further recorded that there is no other right of way for going to block No. 410. It is this part of the report on which the Appellate Court has relied, when in fact, and this is an admitted position, that there is no dispute between the parties in relation to agricultural land bearing block No. 410 which is of absolute ownership of the plaintiff. Thus, the Court Commissioner could not have recorded that the said property, namely land bearing block No.410, was the disputed property or the suit property, and if

he has done so he has committed an error apparent; on the basis of the same the Appellate Court has fallen into error of treating block No.410 as disputed property and the observations of Court Commissioner that follow thereafter have been read to mean that there is no right of way for going to block No.410. In other words, as recorded hereinbefore, at the cost of repetition, the Appellate Court has decided the suit even before the trial has taken place. It is equally well settled that normally no interim relief should be granted which would tantamount to allowing the suit itself.

7 In the circumstances, the impugned order made by the Appellate Court cannot be permitted to operate and the same is quashed and set aside and the order made by the Trial Court dated 23.03.2005 is restored and shall remain in operation till disposal of the suit. Rule made absolute. There shall be no order as to costs.

CIVIL APPLICATION No. 8612 of 2006.

Mr.Bharda does not press this application in light of the order made today in the main petition. The application stands disposed of accordingly.

Sd/-

(D.A.Mehta, J.)

m.m.bhatt.